Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

NO. ~~78~~ 78-348

JAMES R. BURNETT ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO ~~THE SUPREME COURT OF THE UNITED STATES~~
Ark Sup Ct

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OCTOBER TERM, 1978

NO. ———

JAMES R. BURNETT ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner[1] prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Arkansas in this case.

OPINION BELOW

The April 3, 1978 opinion of the Supreme Court of Arkansas is set forth as Appendix I.

JURISDICTION

The opinion of the Supreme Court of Arkansas was entered on April 3, 1978. On May 8, 1978 the Supreme Court

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[1] The Petitioner is James R. Burnett, a resident of Mena, Arkansas.

of Arkansas denied a timely filed petition for rehearing, Appendix II. On June 5, 1978, the Supreme Court of Arkansas entered its order granting motion to recall mandate pending appeal to the United States Supreme Court, Appendix III. On August 8, 1978 Petitioner applied to Mr. Justice Blackmun for an extension of time for filing this petition. Petitioner received a reply stating that the Court could not grant an extension of time once the time for filing has expired. However, permission was given to file a petition for a Writ of Certiorari with the understanding that the Petition will be docketed with a notation as to its untimeliness, Appendix IV.

QUESTIONS PRESENTED

1. Whether evidence obtained as a result of a search warrant is admissible in a criminal trial if the search warrant issues where the affidavit does not provide a sufficient basis for a finding of probable cause as required by the Fourth Amendment to the Constitution of the United States, the Arkansas (Art. 2, §15) and Arkansas Statutes Annotated §43-205 (Supp. 1973)?[2]

2. Whether a search warrant issued on the basis of an affidavit that clearly does not meet Constitutional requirements can be cured by a State procedural rule that requires a motion to quash and a motion to suppress the evidence be filed ten (10) days before the trial without denial of constitutional rights of trial by impartial jury, equal protection of the laws and due process of the law?[3]

[2] **Anguilar v. Texas,** 378 U.S. 108 (1964) holds that affidavit must provide a sufficient basis for finding of probable cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right of an individual to freedom from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Arkansas State Constitution, for all practical purposes is identical. See Art. 2, §15 of the Arkansas State Constitution.

The Due Process and Equal Protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States provides:

[3] Rule 16.2(b) of Criminal Procedure states in part: (a) objection to the use in evidence of things seized shall be made by a motion to suppress evidence. The motion shall be made to the court which is to conduct the trial at which the things seized may be offered in evidence. (b) The motion to suppress shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for good cause shown may entertain a motion to suppress at a later time. (c) Renewal of a motion to suppress which has been denied may be allowed on the ground of newly discovered evidence or as the interests of justice require. . . .

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Arkansas Statutes (1947) annotated, Volume (1960 Replacement), 1973 Cumulative Pocket Supplement, §43-205 provides:

"A search warrant may be issued by any judicial officer of this state, only upon affidavit sworn to before a judicial officer which establishes the grounds for its issuance."[4]

[4] In order to be an affidavit an instrument must be reduced to writing and sworn to or affirmed before some person legally authorized to administer oaths. **Thompson v. Self**, 197 Ark. 70, 122 S.W.2d 182.

STATEMENT

On March 8, 1977, the Sheriff of Polk County, Arkansas, A. L. Hadaway, appeared before the Municipal Judge, Robert L. Shaw, and obtained a search warrant in order to search the premises of James R. Burnett, Petitioner in this case. Later that day a search of Petitioner's premises was conducted. This search allegedly turned up a certain quantity of marijuana along with other materials commonly associated with the smoking of marijuana.

The Prosecuting Attorney for the Ninth Judicial Circuit of the State of Arkansas filed, on March 9, 1977, an information alleging possession of a controlled substance with intent to deliver.

Petitioner, on the day of the trial, filed a motion to quash search warrant and suppress evidence. Appendix V.

Petitioner questioned the validity of the search warrant. Thereupon, the jury was excused from the courtroom and an in-chambers hearing was held. During this hearing, out of the jury's hearing, the affidavit which resulted in the issuance of a search warrant was introduced.[5] The trial judge first considered the validity of the search before entertaining Petitioner's motion to suppress.[6] The judge

[5] Sheriff A. L. Hadaway read the affidavit into the record.

[6] The following exchange took place in the In-Chambers hearing between the trial judge and counsel for Petitioner:

BY THE COURT: Let the record show that the Court finds it to be a valid search under the authority of the Search and Seizure provision through the Criminal Code, and the substance obtained from the search may be introduced into evidence.

MR. NABORS SHAW: Your Honor, in the interest of moving along, I would like the record also to show my exceptions to the ruling of the Court and a continuing objection to the introduction of any evidence in connection with this search warrant.

BY THE COURT: All right, sir. Mr. Shaw, you have with you, I believe, and perhaps ready to file, a Motion to Suppress.

MR. NABORS SHAW: Yes, sir, I have already filed it.

found the search to be valid. He then ruled that the motion to suppress was untimely filed. Petitioner strenuously objected to the introduction of this evidence during his trial.

After presentation of the evidence, introduced over Petitioner's objections, the jury rendered a verdict in favor of the State. Petitioner was given the maximum prison sentence for the crime charged (Appendix VI). Notice of appeal (Appendix VII) was timely given and the entire record designated for appeal purposes, designation of record (Appendix VII). Affidavit in support of Search Warrant set forth as Appendix VIII.

Petitioner timely perfected his appeal to the Arkansas Supreme Court. On April 3, 1978, the Arkansas Supreme Court affirmed the judgment of the trial court. On May 8, 1978, the Arkansas Supreme Court denied a timely filed petition for rehearing.

The Constitutional issues were properly raised on appeal and decided adversely to Petitioner by the Supreme Court of Arkansas in its opinion entered April 3, 1978.

REASONS FOR GRANTING THE WRIT

This case involves two important constitutional issues. First, whether evidence obtained as a result of a search warrant is admissible in a criminal trial if a search warrant issues where the affidavit given in support does not provide a sufficient basis for a finding of probable cause as required by the Fourth Amendment to the Constitution of the United States, the Arkansas State Constitution (Art. 2, §15) and Arkansas Statutes Annotated §43-205 (Supp. 1973). The second is whether an affidavit that, at its inception is deficient, can be cured by a State's procedural rule that requires a motion to quash the warrant and a motion to

suppress the evidence be filed ten (10) days before the trial date without denial of constitutional rights of trial by impartial jury, equal protection of the laws and due process of the law.

The first question is compelling, especially in view of the fact that the trial judge determined that the search warrant was valid. Such determination necessarily finds that there was probable cause for the issuance of a search warrant.

As a matter of constitutional law, if a search warrant issues where the affidavit does not provide a sufficient basis for a finding of probable cause, the evidence obtained as a result of such a search warrant is inadmissible in a criminal trial, state as well as federal. See *Anguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509 (1964).

It is well settled that an affidavit cannot establish probable cause for the issuance of a search warrant if it merely states the affiant's suspicion or belief without stating the facts and circumstances upon which that belief is based. See *United States v. Vantresco,* 380 U.S. 102, 85 S.Ct. 741 (1965); *Durham v. State,* 251 Ark. 164, 471 S.W.2d 527 (1971).

It has been held that only innocent-seeming activity and data are reflected by allegations that the accused traveled to and from an apartment building and entered an apartment, and that the apartment contained two separate telephones, and that probable cause had not been shown for the search of the apartment by an affidavit which recited such activity, together with the accused's reputation as a bookmaker and a tip from an informant. See *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584 (1969). In *Spinelli* the Court held that the allegation that a person was known

to the affiant, an F.B.I. Agent, and to other law enforcement officers as a gambler and an associate of gamblers is merely a bold and unilluminating assertion of suspicion that is entitled to no right in appraising a magistrate's decision as to whether probable cause existed for the issuance of a search warrant.

In *Byars v. State,* 259 Ark. 158, 533 S.W.2d 175 (1976), the Court held that an affidavit merely stating in effect that affiant trooper had reason to believe that marijuana, drugs, and/or narcotics or other paraphernalia were concealed in specified automobile driven by suspect, that affiant had received information from a confidential source, who was of known reliability, and had furnished reliable information in the past, and that suspect had general reputation of engaging in transporting and selling marijuana and drugs, was insufficient to support a search warrant for car.

"Arkansas Statutes (1947) Annotated, Volume (1960 Replacement), 1973 Cumulative Pocket Supplement, §43-205 has been interpreted by the Arkansas Supreme Court as eliminating from consideration any oral testimony before a magistrate unless it is reduced to writing and accompanied by affidavit. See *Cockrell v. State,* 256 Ark. 19, 505 S.W.2d 204 (1974). In order to be an affidavit an instrument must be reduced to writing and sworn to or affirmed before some person legally authorized to administer oaths. See *Thompson v. Self,* 197 Ark. 70, 122 S.W.2d 182.

Thus, the affidavit must stand or fall on the information, reduced to writing, contained therein. In *Byars* the Court said that the fact that later testimony before Circuit Court established that there was ample evidence for issuance of search warrant for car if such evidence had been disclosed and fact that marijuana was found in the

car during the search did not alter the invalidity of search warrant issued on basis of insufficient affidavit. A search unlawful at its inception is not validated by what it turns up, it is good or bad when it starts and does not change character from its success. See *Walton v. State,* 245 Ark. 84, 431 S.W.2d 462 (1969).

Petitioner contends that his Fourth Amendment right to be free from unreasonable searches and seizure has been seriously impaired through the issuance of this search warrant which was not supported by probable cause, and, therefore should never have been issued.

The Arkansas Rules of Criminal Procedure state that motions to suppress shall be filed not later than ten days before the trial date except when the court, for good cause, entertains the motion at a later time. Rule 16.2(b), Rules of Criminal Procedure (Repl. 1977). Petitioner contends that this Rule is unconstitutional both on its face and in its application in this instance. The Fourth Amendment to the Constitution of the United States and a similar provision found in Article 2, Section 15 of the Constitution of the State of Arkansas unequivocally provides that "no warrants shall issue, but on probable cause, supported by oath or affirmation . . ."

A search unlawful in its inception does not change character because Petitioner did not file a motion to suppress ten days before the date of the trial. The State of Arkansas did not follow Constitutional guidelines in determining probable cause for the issuance of the warrant in this instance. The State of Arkansas in this case did not follow their own legislative guidelines nor did they follow the requirements as set forth in numerous decisions by the

United States Supreme Court as well as decisions promulgated by the Arkansas Supreme Court.

Petitioner filed a motion to suppress on the day of the trial. Petitioner objected to the introduction of the evidence allegedly obtained as a result of this search warrant. This objection should be considered good. Especially since the state had no basis on which to issue the search warrant in the first instance.

As a matter of Constitutional law, if a search warrant issues where the affidavit does not provide a sufficient basis for a finding of probable cause, the evidence obtained as a result of such a search warrant is inadmissible in a criminal trial, state as well as federal. See *Anguilar*.

Before the state may invade the privacy of an individual, its representatives are required to comply with the basic command of the Fourth Amendment and the State Constitution. Violations of this basic command must not be tolerated in the name of enforcement and pre-trial procedure.

CONCLUSION

For the foregoing reasons it is submitted that a Writ of Certiorari should issue to review the April 3, 1978 decision of the Supreme Court of Arkansas in this case.

Respectfully submitted,

NABORS SHAW
504 Church Street
Post Office Box 27
Mena, Arkansas 71953

Attorney for Petitioner

Appendix

APPENDIX I

DIVISION 1
SUPREME COURT OF ARKANSAS
No. CR 77-222
Opinion Delivered April 3, 1978

JAMES R. BURNETT ..... *Appellant*

v.

STATE OF ARKANSAS ..... *Appellee*

APPEAL FROM
POLK COUNTY CIRCUIT COURT
BOBBY STEEL, *Judge*

Affirmed.

DARRELL HICKMAN, *Associate Justice*

James R. Burnett was convicted of possession of marijuana with intent to deliver and sentenced by the Pope County Circuit Court to a term of imprisonment in the Arkansas penitentiary.

On appeal Burnett argues that the court improperly admitted evidence obtained from a search of Burnett's residence. There was no motion filed to quash the search warrant nor to suppress the evidence until the trial had commenced. Burnett concedes the motion was untimely filed but argues on appeal that this motion was not overruled because of untimeliness.

The Arkansas Rules of Criminal Procedure state that motions to suppress shall be filed not later than ten days before the trial date except when the court, for good cause,

entertains the motion at a later time. Rule 16.2(b), Rules of Crim. Proc. (Repl. 1977). No evidence of cause for the late filing was offered by the appellant.

The trial judge did permit Burnett to question the search. However, after reading into the record the first page of a motion filed to quash the search warrant and suppress the evidence, the court stated:

> Motion to suppress is denied. Let the record reflect the motion to suppress was filed after the trial had already started.

Apparently, later during the trial, other written objections were filed to challenge the search and seizure.

When it was called to the court's attention that these more specific objections had been made by written motion, the court stated:

> . . . I will not permit it to be filed at this late hour. Motion is denied.

The fact that the trial court permitted the attorney for Burnett to question the sheriff and other witnesses regarding the search warrant and the affidavit does not mean that the court approved the untimely filing of the motion to suppress. We feel the record shows that the court ruled that the motion or motions, as the case may be, were ruled untimely.

We made a similar decision in *Parham v. State*, 262 Ark. 241, 555 S.W.2d 943 (1977).

It is unnecessary for us to consider the arguments of the appellant regarding the validity of the search warrant.

Affirmed.

We agree. Harris, C.J., and George Rose Smith and Howard, JJ.

APPENDIX II

SUPREME COURT OF ARKANSAS

JAMES R. BURNETT ..... *Appellant*

vs. No. 77-6

STATE OF ARKANSAS ..... *Appellee*

PETITION FOR REHEARING

Comes now, Appellant, JAMES R. BURNETT, and for his Petition for Rehearing, states:

1. That by opinion delivered April 3, 1978, this Court affirmed Appellant's conviction by the Polk County Circuit Court, and Appellant believes that the Court's opinion contains specific errors of law and fact.

2. Appellant believes that the trial court erred in the law when the Judge said:

> Let the record show that the court finds it to be a valid search under the authority of the Search and Seizure provision through the Criminal Code, and the substance obtained from the search may be introduced into evidence. (TR. 60 — Appellant's brief 35)

Appellant contends that the search warrant was void on its face as the affidavit to support the search warrant was insufficient as a matter of law to support probable cause for issuance of the warrant and therefore could not possibly be authorized under the Search and Seizure provision through the Criminal Code, and, therefore, the trial court committed reversible error when it determined that the search was valid under the authority of the Search and Seizure provision through the Criminal Code.

Appellant objected to the validity of the search warrant. In finding search to be valid, the trial court did not rely on the premise that the motion was not timely

filed. Rather, the trial Judge found it to be valid under the authority of the Search and Seizure provision through the Criminal Code. Appellant contends that this was reversible error as a matter of law.

WHEREFORE, premises considered, Appellant prays the Court to grant it rehearing, correct what Appellant believes to be an error of law committed by the trial court, and to reverse the judgment of the Circuit Court of Polk County, Arkansas, as pertains to Appellant, JAMES R. BURNETT.

/s/ NABORS SHAW
SHAW & SHAW
P.O. Box 27
Mena, Arkansas 71953
Attorneys for Appellant,
James R. Burnett

COUNSEL'S CERTIFICATE

Comes, NABORS SHAW, attorney for the Appellant, JAMES R. BURNETT and states that he verily believes that there is merit in the Petition for Rehearing and that it is not filed for the purpose of delay in this case. Counsel further certifies that he has this day deposited in the regular United States Mails a copy of the above and foregoing Petition for Rehearing addressed to Honorable David Maddox, Deputy Prosecuting Attorney, 507 Hickory Street, Mena, Arkansas 71953; Honorable Bobby Steel, Circuit Court Judge, Nashville, Arkansas; Honorable George Steel, Jr., Prosecuting Attorney, Nashville, Arkansas, with sufficient postage affixed thereto on this 18th day of April, 1978.

/s/ Nabors Shaw

FILED: April 19, 1978
JIMMY H. HAWKINS, Clerk

APPENDIX III

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
) SCT.
IN THE SUPREME COURT)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the courtroom in the City of Little Rock, on the 3rd day, being the first Monday of October, A.D. 1977, amongst others were the following proceedings, to-wit:

On the 5th day of June, A.D. 1978, a day of said term

JAMES R. BURNETT *Appellant* vs. No. CR77-222 STATE OF ARKANSAS *Appellee*	Appeal from Polk Circuit Court

Motion to recall mandate pending appeal to the United States Supreme Court is granted; Sureties must agree to remain on bond.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 19th day of June, A.D. 1978.

Jimmy H. Hawkins, Clerk
By: /s/ Robin Henderson, D.C.

APPENDIX IV

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

August 9, 1978

Nabors Shaw, Esquire
Shaw & Shaw
P.O. Box 27
Mena, Arkansas 71953

Re: JAMES R. BURNETT v. ARKANSAS

Dear Mr. Shaw:

I am returning your application for extension of time. This Court cannot grant an extension of time once the time for filing has expired.

If you still desire to file a petition for a writ of certiorari, you may do so and your petition will be docketed with a notation as to its untimeliness.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By: /s/ Timothy J. Aluise
Assistant Clerk

th
Enc.

APPENDIX V

IN THE
CIRCUIT COURT OF POLK COUNTY, ARKANSAS

STATE OF ARKANSAS ..... *Plaintiff*

vs. Docket No. CR-77-6

JAMES R. BURNETT ..... *Defendant*

MOTION TO QUASH SEARCH WARRANT AND SUPPRESS EVIDENCE

Comes now the defendant, JAMES R. BURNETT and for his Motion, states:

1. That the purported Search Warrant, a copy of which is marked Exhibit "A", attached hereto and made a part hereof by reference as though set forth verbatim, was issued unlawfully and illegally and should be quashed and the items and articles seized pursuant thereto suppressed as evidence herein.

2. The purported Search Warrant was issued unlawfully for the following reasons:

A. The affidavit, a copy of which is marked Exhibit "B", attached hereto and made a part hereof by reference as though set forth verbatim, on which the purported search warrant was issued was insufficient as a matter of law.

B. The issuing judicial officer, a Municipal Judge, incorrectly found probable cause in the Affidavit for the issuance of the warrant.

C. The Affidavit did not contain facts sufficient as a matter of law to establish probable cause.

D. The purported search warrant does not specify the premises to be searched.

/s/ Nabors Shaw

Filed: April 27, 1977
11:00 A.M.

APPENDIX VI

IN THE
CIRCUIT COURT OF POLK COUNTY, ARKANSAS

STATE OF ARKANSAS ..... *Plaintiff*

vs. Docket No. CR-77-6

JAMES R. BURNETT ..... *Defendant*

VERDICT OF THE JURY

We, the jury, find the defendant, James R. Burnett, guilty of possession of marijuana with the intent to deliver and fix his punishment by 10 years in the State Penitentiary, by a fine of $ 0 .

/s/ James R. Blackburn
Foreman

APPENDIX VII

IN THE
CIRCUIT COURT OF POLK COUNTY, ARKANSAS

STATE OF ARKANSAS ..... *Plaintiff*

vs. Docket No. CR-77-6

JAMES R. BURNETT ..... *Defendant*

NOTICE OF APPEAL AND CERTIFICATE OF ORDERING TRANSCRIPT

Comes the Defendant, JAMES R. BURNETT, and hereby gives notice that he appeals the verdict, conviction, judgment and sentence had in this cause in the Circuit Court of Polk County, Arkansas to the Supreme Court of Arkansas. Defendant further states and certifies that this appeal is also from the Court's overruling the Defendant's Motion for a new trial a hearing of which was had on July 19, 1977. The Defendant hereby designates the entire record and simultaneously with the filing of this Notice of Appeal has requested Mrs. Daisy Steel, Court Reporter for the Ninth Judicial Circuit to prepare a transcript of all of the proceedings in said cause including the proceedings on the Motion for a new trial and the hearing thereon. Also, a transcript of the entire record from the Circuit Court Clerk's Office in Polk County, Arkansas, Mrs. Janie Foster, is ordered and requested.

/s/ Nabors Shaw,
Attorney for Defendant

CERTIFICATE

I hereby certify that a copy of the above and foregoing was served upon the following by depositing of same in the regular United States Mails addressed to Honorable Bobby Steel, Circuit Court Judge, Nashville, Arkansas; Honorable George Steel, Jr., Prosecuting Attorney, Nashville, Arkansas; Mrs. Daisy Steel, Court Reporter, Nashville, Arkansas and the Notice of Appeal has also been filed with Mrs. Janie Foster, Circuit Court Clerk, Mena, Arkansas, with sufficient postage affixed thereto on this 15th day of August, 1977.

/s/ Nabors Shaw

Filed: August 15, 1977.

APPENDIX VIII

STATE'S EXHIBIT NO. 1

AFFIDAVIT FOR SEARCH WARRANT

STATE OF ARKANSAS)
) SS
COUNTY OF POLK)

Before Honorable Robert L. Shaw, Municipal Judge.

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises described as Part of the NE¼ SW¼ NE¼, Sect. 1, T. 2 So., R. 29 W — 2.72 acres and .81 acres adjoining first mentioned tract occupied by Jim Burnett and located approximately ½-mile NW of Ink Snack Bar on State Hwy. No. 88 at Ink, Ark. in said County of Polk, State of Arkansas, there is now being concealed certain property, namely cannabis sativa L, commonly known as marijuana, which is illegal to possess.

And all the facts tending to establish the foregoing request for issuance of a Search Warrant are as follows: Affiant, Sheriff A. L. Hadaway, apprehended Kenneth Wilcox in possession of approx. one ounce of marijuana and investigation revealed that subject had recently been to the Jim Burnett premises — Burnett being known to affiant to have in the past to grow marijuana.

/s/ C. L. Hadaway
Signature of Affiant
Polk County Sheriff
Official Title

SWORN to before me, and subscribed in my presence this 8th day of March, 1977.

/s/ Robert L. Shaw
Mena Municipal Judge